A

Stealth Infra Sdn Bhd v SR Alias bin Marjoh

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-186–05 OF 2014
LAU BEE LAN J
25 DECEMBER 2015

C *Contract — Agreement — Binding agreements — Defendant issued letter of award — Plaintiff signed and sealed letter of award — Defendant terminated letter of award — Whether letter of award constitute binding agreement — Whether defendant's action of terminating letter of award lawful — Whether plaintiff entitled to specific performance of letter of award — Whether plaintiff* D *entitled to general damages*

The plaintiff had issued a letter of proposal dated 27 February 2007 to the defendant to propose a joint-venture project development of a luxury condominium building. During the meeting between the plaintiff and the E defendant on 28 February 2007, the defendant had issued a letter of award ('the agreement') to the plaintiff to develop the project. The plaintiff had on 13 March 2007 signed and placed its seal upon the agreement signifying its acceptance of the terms. It was provided in the agreement that other terms and conditions shall be contained in a development rights agreement to be executed F by both parties. Subsequently in 2007, the plaintiff was contacted by the chairman of defendant to delay the project until further instructions by the defendant. In 2012, again, the defendant had contacted the plaintiff and instructed the plaintiff to proceed with the project. Pursuant to the agreement, the plaintiff's solicitors then delivered to the defendant a copy of the draft G development rights agreement ('the draft'). Upon receiving the draft, the defendant held a committee meeting and issued a revocation letter stating that the agreement was terminated. However, the plaintiff did not agree with the termination and insisted to proceed and/or execute the agreement. The plaintiff brought an action against the defendant and claimed that a legally H binding and enforceable contract was created upon issuance of the letter of award. In its defence, the defendant submitted that the contract was void and unenforceable because: (a) the letter of award was unauthorised, in non-compliance of Kelab Sukan Dewan Bandaraya Kuala Lumpur ('KSDBKL') rules and/or unilateral in character; (b) the current committee had I no knowledge of the letter of award; (c) the letter of award amounted to conditional award; (d) there was a lack of consideration in the letter of award; and (e) there was a delay of six years. The agreed issues to be tried were: (i) whether a binding agreement was formed through the issuance of the letter of award and execution of the same by the plaintiff; (ii) whether the termination

of letter of award was lawful; (iii) whether the plaintiff was entitled to specific performance of the letter of award; and (iv) whether the plaintiff was entitled to general damages amounting to RM36,066,451 for breach of contract if the specific performance was not a suitable remedy.

Held, allowing the plaintiff's claims with costs of RM50,000:

(1) The facts that the issuance of the letter of award not being in compliance with the KSDBKL rules and was not specifically pleaded and these therefore irrelevant to the proceedings. It is trite law that the court will only decide on matters pleaded and not otherwise. The court was of the view that the internal management rule (*Turquand*'s rule) applied in that the plaintiff was entitled in law and in fact to presume that all internal processes and rules of the defendant were complied with (see paras 19–20).

(2) The court disagreed with the defendant's contention that the current committee had no knowledge of the letter of award because the contention was inconsistent with the contemporaneous evidence and the probabilities of the case (see para 23).

(3) On a balance of probabilities, the court found that there was an offer and acceptance of the plaintiff's letter of award. Further, there was free consent of the parties because all the essential terms of the agreement were agreed upon as contained in the letter of award. The plaintiff did perform consideration as there was promise by the plaintiff to develop the property under the term in para 2(iv) of the letter of award; and to make the deposit payment of RM1,000 upon the execution of the development rights agreement and a specified number of condominiums equivalent to the value of RM4,220,000. In consideration, the defendant agreed to assign the developments rights to the plaintiff and granting the plaintiff a power of attorney in order to perform the development rights. The letter of award was not a conditional contract as it was clear that the terms and conditions to be finalised in the development rights agreement was but a term to be fulfilled and not a condition of which the performance of the agreement was contingent upon. Thus, based on the evidence, the letter of award was a legally binding agreement between the plaintiff and the defendant (see paras 24, 26, 29, 31 & 33).

(4) There was a deferment of the agreement pending the resolution of the defendant's internal matters. On balance of probabilities, the court found that it was about three weeks after the issuance and acceptance of the letter of award that the defendant's representative informed the plaintiff's representative orally to defer the agreement due to said internal issues. Thus the notice of termination by the defendant to the plaintiff was unlawful as it was unilateral decision without giving reasons in the termination letter. Further the six reasons given by the defendant as

grounds justifying the termination of the letter of award was unacceptable because none of the reasons were ever informed to the plaintiff (see para 36).

(5) Notwithstanding the fact that it was the defendant who deferred the agreement till about 2012, the court was of the view that for such a huge project, the plaintiff ought to have requested from the defendant a letter of confirmation asking the plaintiff to defer the matter. Therefore, the plaintiff's application for specific performance was disallowed (see para 37).

(6) Based on the evidence, the feasibility study upon which the plaintiff depended to arrive at the loss of future profits of RM36,066,451 was but an estimation which could be varied; and therefore, the plaintiff had failed to provide credible and reliable evidence to satisfy the said claim. Nevertheless, applying the principle in *Juta Damai*, 15% reduction damages for the unlawful termination at 1% of RM36,066,451 which was RM1,081,993.53 was allowed (see para 39).

[Bahasa Malaysia summary

Plaintif telah mengeluarkan surat tawaran bertarikh 27 Februari 2007 kepada defendan untuk mencadangkan projek pembangunan usahasama bangunan kondominium mewah. Sepanjang mesyuarat antara plaintif dan defendan pada 28 Februari 2007, defendan telah mengeluarkan surat award ('perjanjian itu') kepada plantif untuk membangunkan projek itu. Plaintif telah pada 13 Mac 2007 menandatangani dan meletakkan meterainya setelah perjanjian itu menandakan penerimaannya untuk terma-terma itu. Ia diperuntukkan dalam perjanjian itu bahawa terma-terma dan syarat-syarat lain hendaklah terkandung dalam perjanjian hak pembangunan yang disempurnakan oleh kedua-dua pihak. Berikutan itu pada 2007, plaintif telah dihubungi oleh pengerusi defendan untuk melengahkan projek itu sehingga arahan selanjutnya oleh defendan. Pada 2012, sekali lagi, defendan telah menghubungi plaintif dan mengarahkan plaintif meneruskan projek itu. Berikutan perjanjian itu, peguamcara plaintif kemudian telah menghantar kepada defendan salinan draf perjanjian hak pembangunan ('draf itu'). Setelah menerima draf itu, defendan telah mengadakan mesyuarat jawatankuasa dan telah mengeluarkan surat pembatalan dengan menyatakan bahawa perjanjian itu telah ditamatkan. Walau bagaimanapun, plaintif tidak bersetuju dengan penamatan itu dan bertegas untuk meneruskan dan/atau menyempurnakan perjanjian itu. Plaintif telah memulakan tindakan terhadap defendan dan mendakwa bahawa kontrak yang mengikat secara sah dan berkuat kuasa telah diwujudkan setela keluaran surat award itu. Dalam pembelaannya, defendan berhujah bahawa kontrak adalah tidak sah dan tidak boleh dikuatkuasakan kerana: (a) surat award itu tidak diberi kuasa, yang tidak mematuhi peraturan Kelab Sukan Dewan Bandaraya Kuala Lumpur ('KSDBKL') dan/atau bersifat unilateral; (b) jawatankuasa semasa tidak mempunyai pengetahuan tentang

surat award itu; (c) surat award itu merupakan award bersyarat; (d) tiada pertimbangan dalam surat award itu; dan (e) terdapat kelewatan enam tahun. Isu-isu yang dipersetujui untuk dibicarakan adalah: (i) sama ada perjanjian yang mengikat terbentuk melalui keluaran surat award itu dan penyempurnaan yang sama oleh plaintif; (ii) sama ada surat penamatan award itu adalah sah; (iii) sama ada plaintif berhak kepada pelaksanaan spesifik untuk surat award itu; dan (iv) sama ada plaintif berhak kepada ganti rugi am berjumlah RM36,066,451 kerana pelanggaran kontrak jika pelaksanaan spesifik bukan remedi yang sesuai.

Diputuskan, membenarkan tuntutan plaintif dengan kos sejumlah RM50,000:

(1) Fakta bahawa keluaran surat award itu tidak mematuhi peraturan KSDBKL dan tidak dipli secara spesifik dan yang berikut tidak relevan kepada prosiding. Ia adalah undang-undang lapuk bahawa mahkamah hanya akan memutuskan tentang perkara-perkara yang dipli dan bukan sebaliknya. Mahkamah berpendapat bahawa peraturan pengurusan dalaman ('peraturan *Turquand*') terpakai di mana plaintif berhak dari segi undang-undang dan fakta untuk menganggap bahawa semua proses dalaman dan peraturan deefndan telah dipatuhi (lihat perenggan 19–20).

(2) Mahkamah tidak bersetuju dengan hujah defendan bahawa jawatankuasa semasa tidak mempunyai pengetahuan tentang surat award itu kerana hujah itu tidak konsisten dengan keterangan semasa dan kebarangkalian kes itu (lihat perenggan 23).

(3) Atas imbangan kebarangkalian, mahkamah mendapati bahawa terdapat tawaran dan penerimaan surat award plaintif itu. Selanjutnya, terdapat persetujuan bebas daripada pihak-pihak kerana semua terma-terma penting perjanjian telah dipersetujui sepertimana terkandung dalam surat award itu. Plaintif telah melaksanakan pertimbangan kerana janji oleh plaintif untuk membangunkan hartanah itu di bawah perenggan 2(iv) surat award itu; dan untuk membuat bayaran deposit RM1,000 selepas pelaksanaan perjanjian hak pembangunan itu dan sebilangan kondominium yang dinyatakan sama dengan nilai RM4,220,000. Sebagai balasan, defendan bersetuju untuk menyerah hak-hak pembangunan itu kepada plaintif dan memberikan plaintif kuasa wakil bagi tujuan melaksanakan hak-hak pembangunan itu. Surat award itu bukan kontrak bersyarat kerana ia adalah jelas bahawa terma-terma dan syarat-syarat untuk dimuktamadkan dalam perjanjian hak pembangunan hanya terma yang perlu dipenuhi dan bukan syarat yang mana pelaksanaan perjanjian itu bergantung pada. Oleh itu, berdasarkan keterangan, surat award itu adalah perjanjian mengikat yang sah antara plaintif dan defendan (lihat perenggan 24, 26, 29, 31 & 33).

(4) Terdapat penangguhan perjanjian itu sementara menunggu penyelesaian perkara-perkara dalaman defendan. Atas imbangan kebarangkalian, mahkamah mendapati bahawa ia adalah lebih kurang tiga minggu selepas keluaran dan penerimaan surat award itu wakil defendan memberitahu wakil plaintif secara lisan untuk mengangguh perjanjian itu disebabkan isu-isu dalaman tersebut. Oleh itu notis penamatan oleh defendan kepada plaintif adalah menyalahi undang-undang kerana ia adalah keputusan sebelah pihak sahaja tanpa memberi sebab-sebab penamatan surat itu. Selanjutnya enam sebab yang diberikan oleh defendan sebagai alasan mewajarkan penamatan surat award itu tidak boleh diterima kerana tiada satu pun daripada sebab itu dimaklumkan kepada plaintif (lihat perenggan 36).

(5) Walau apa pun fakta bahawa ia adalah defendan yang menangguhkan perjanjian itu sehingga 2012, mahkamah berpendapat bahawa untuk projek sebesar itu, plaintif sepatutnya telah meminta daripada defendan satu surat pengesahan memberitahu plaintif untuk menangguhkan perkara itu. Oleh demikian, permohonan plaintif untuk pelaksanaan spesifik tidak dibenarkan (lihat perenggan 37).

(6) Berdasarkan keterangan, kajian kebolehlaksanaan yang mana plaintif bergantung kepada untuk tiba kepada kehilangan keuntungan masa depan berjumlah RM36,066,451 adalah hanya anggaran yang boleh diubah; dan oleh itu, plaintif telah gagal memberikan keterangan yang berwibawa dan boleh dipercayai untuk memuaskan tuntutan itu. Namun begitu, dengan mengguna pakai prinsip dalam kes *Juta Damai*, 15% daripada ganti rugi pengurangan untuk penamatan yang menyalahi undang-undang pada 1% daripada RM36,066,451 iaitu RM1,081,993.53 adalah dibenarkan (lihat perenggan 39).]

Notes

For cases on binding agreements, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3275–3277.

Cases referred to

Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor [2014] 3 MLJ 672; [2014] 6 CLJ 17, CA (refd)

Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors [1979] 2 MLJ 224; [1979] 1 LNS 29, FC (refd)

Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd [2014] 5 MLJ 676; [2014] 5 CLJ 318, CA (folld)

Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors [2009] 4 MLJ 759; [2009] 4 CLJ 365, FC (refd)

MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd [2010] 5 MLJ 71; [2010] 1 CLJ 36, CA (refd)

Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Another Appeal [2013] 7 CLJ 713, CA (refd)
Paramaha Enterprise Sdn Bhd & Ors v The Government of the State of Sabah & Anor [2015] 2 CLJ 268, CA (distd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)
Royal British Bank v Turquand [1843-60] All ER Rep 435 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151; [1998] 3 CLJ 503, FC (folld)

Legislation referred to

Contracts Act 1950 ss 2(d), 10, 13, 14
Evidence Act 1950 s 92(e)
National Land Code Form 16A
Sports Development Act 1967 s 17

Ramesh Kanapathy (Azad bin Akbar Khan with him) (Chellam Wong) for the plaintiff.
Yee Fei Churn (Farrahanie Yasmin bt Ahmad Yusoff with him) (Davis & Low) for the defendant.

Lau Bee Lan J:

BACKGROUND FACTS

[1] The defendant is a sports club registered pursuant to s 17 of the Sports Development Act 1967. At the filing date of this suit (28 May 2014), Sr Alias bin Marjoh was one of the members authorised by the registrar of the Sports Commissioner Office of Malaysia and registered as an office bearer to Kelab Sukan Dewan Bandaraya Kuala Lumpur ('KSDBKL') through his position as vice president (Naib Yang Dipertua).

[2] The plaintiff has issued a letter of proposal dated 27 February 2007 ('letter of proposal') to the defendant, to propose a joint-venture project development with the defendant to develop Lot 242, Seksyen 95, Mukim Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan held under title No PN 206 with an area of 19602.19sqmt at Jalan Brickfields Satu, Kuala Lumpur which is owned by the defendant ('the property') (exh P1, B/48–51).

(a) the terms of the letter of proposal are, inter alia, as follows:

(i) under cl 2(v) of the letter of proposal, it stated that the consideration of Ringgit Malaysia One Thousand (RM1,000) will be paid by plaintiff upon the execution of the development rights agreement to be signed by both parties; and

(ii) under cl 3 of the letter of proposal, it stated that other terms and conditions shall be finalised in a development rights agreement to be executed by both parties.

[3] On 28 February 2007, the defendant held a meeting which was attended by five members of KSDBKL and a representative from the plaintiff to discuss the letter of proposal.

[4] During the meeting, there were several new important matters raised by the defendant, inter alia:

(a) the plaintiff must provide a proposal regarding the losses confronted by the defendant when the project is under construction;

(b) the plaintiff's representative also stated that the construction of the condominium will be completed in 18 months but he did not mention when the construction will commence;

(c) to sign a rental management agreement; and

(d) to set up a management company.

[5] Later, on the same day (28 February 2007), the defendant issued a letter of award dated 28 February 2007 (B/1–3) ('the letter of award') to the plaintiff to, inter alia, develop the property.

[6] The plaintiff had on 13 March 2007 signed and placed its seal upon the letter of award therewith signifying its acceptance of the terms stated in the letter of award ('the agreement').

[7] The salient terms of the agreement are as follows:

(iii)	The Proposed Development	Proposed 23-storey luxury condominium building of 91 condominium units together with 3 levels of car park podium and 3 levels of basement car parks.
(iv)	The Development Rights	Kelab Sukan Dewan Bandaraya Kuala Lumpur agreed assigning the exclusive development right and authority to develop and undertake the whole development project including financing, designing, constructing and selling the units of the Proposed Development by Hijrah Wangsa Sdn Bhd in exchange for the abovementioned piece of land with consideration in clause 2(v) herein.

		In order to perform the said development rights, Kelab Sukan Dewan Bandaraya Kuala Lumpur also granting Hijrah Wangsa Sdn Bhd the Power of Attorney for developing the said Land in the name of Kelab Sukan Dewan Bandaraya Kuala Lumpur or on behalf of Kelab Sukan Dewan Bandaraya Kuala Lumpur.
(v)	Consideration	Cash & In-Kind Consideration comprising of (a) Deposit Payment of Ringgit Malaysia one thousand (RM1,000) upon the execution of the Development Rights Agreement to be signed by both parties ('the Agreement'). (b)The balance of In-Kind Consideration of a specified number of condominium units equivalent to the value of Ringgit Malaysia Four Million Two Hundred and Twenty-Two Thousand (RM4,220,000) only.

It is also provided in the said agreement that other terms and conditions shall be contained in a development rights agreement to be executed by both parties. This is evident through a reading of the following paragraph to the letter of award ('the agreement'):

> 3. Other terms and conditions shall be finalised in a Development Rights Agreement to be executed by both parties.

[8] According to the plaintiff in 2007 the plaintiff was contacted by Ab Salim bin Mansor, the chairman of the defendant at the material time to request for a delay of the said joint venture project until further instructions were given by the defendant.

[9] Further in 2012 according to the plaintiff Abdul Salim bin Mansor gave instructions for the continuation of the joint venture project. Dato' Amrul from the plaintiff answered in the affirmative and proceeded to fulfil the obligations of the plaintiff pursuant to the agreement.

[10] On 4 October 2013 the plaintiff's solicitors, Messrs Nordin Torji & Yussof Ahmad delivered to the defendant a copy of the draft development rights agreement as provided for by the agreement.

[11] The defendant then held a committee meeting on 21 November 2013 and later issued a revocation letter dated 23 December 2013 to the plaintiff stating that the letter of award is terminated.

[12] The defendant has received a letter from the plaintiff dated 15 January

2014 stating that they do not agree with the termination and insisted to proceed and/or to execute the letter of award.

[13] In essence, the plaintiff's claim is that a legally binding and enforceable contract was created upon the defendant's issuance of a letter of award dated 28 February 2007. Upon receiving instructions to postpone/delay works three weeks later, the plaintiff complied. The plaintiff received instructions to recommence works on or about 2012 and issued a draft development rights agreement in furtherance of the same. However on 23 December 2013 the defendant unlawfully terminated the agreement created by the letter of award.

[14] Whilst the defendant's defence is the contract is void and unenforceable essentially for these reasons:

(a) the issuance of the letter of award was unauthorised, in non-compliance of the law, and/or is unilateral in character (para 5);

(b) the current committee had no knowledge whatsoever of this letter of award (para 6 of the defence);

(c) there was a purported lack of consideration in the letter of award (para 7 of the defence);

(d) the letter of award amounted to a conditional/contingent award (para 8 of the defence); and

(e) the delay of six years.

[15] Essentially the defendant's counterclaim is that the plaintiff's private caveat bearing presentation No 18244/2013 upon the property may be the cause that no response has been given by the land office in its various applications to the same, therewith preventing the plaintiff from proceeding with an agreement it had entered into with a Zax Trillion dated 8 January 2014. Thus the defendant makes claim for special damages of RM12m and general damages to be assessed by the court.

[16] After considering the written cum oral submissions of the parties I was of the view that the agreed issues to be tried be amended slightly as follows:

(i) whether a binding agreement was formed between the plaintiff and the defendant through the defendant's issuance of the letter of award dated 28 February 2007 and the plaintiff's execution of the same on 13 March 2007 ('the agreement') ('Issue 1');

(ii) should the court find in favour of issue (i) above, whether the defendant's action of terminating the agreement is lawful termination (amended issue) ('Issue 2');

(iii) should the court find the termination is unlawful, whether the plaintiff is entitled to specific performance of the agreement ('Issue 3');

(iv) should the court find that specific performance is not a suitable remedy, whether the plaintiff is entitled to general damages amounting to RM36,066,451 for breach of contract ('Issue 4'); and

(v) whether the private caveat entered on the property is made lawfully ('Issue 5').

[17] On 17 April 2015 on a balance of probabilities, I made the following decision:

(1) suatu kontrak telahpun terjalin diantara pihak plaintif dan defendan melalui surat tawaran bertarikh 28 Februari 2007;

(2) bahawa pembatalan surat tawaran bertarikh 28 Februari 2007 oleh defendan adalah salah di sisi undang-undang;

(3) bahawa tuntutan plaintif untuk perlaksanaan spesifik terhadap surat tawaran bertarikh 28 Februari 2007 adalah ditolak;

(4) bahawa tuntutan alternatif plaintif untuk jumlah wang RM36,066,451 sebagai gantirugi kehilangan keuntungan masa depan adalah ditolak;

(5) bahawa defendan membayar kepada plaintif jumlah wang RM1,081,993.53 selaku gantirugi am untuk kemungkiran surat tawaran bertarikh 28 Februari 2007;

(6) bahawa kemasukkan kaveat persendirian plaintif dengan nombor perserahan 18244/2014 adalah salah di sisi undang-undang dan tidak sah;

(7) bahawa plaintif diarahkan untuk membatalkan kaveat persendirian tersebut dalam tempoh masa 14 hari daripada tarikh perintah ini. Defendan dikehendaki membayar RM50,000 sebagai kos kepada tindakan ini.

(a) the plaintiff has appealed against a part of the said decision dismissing (i) the plaintiff's claim for specific performance and (ii) in lieu of specific performance, the plaintiff's alternative claim for RM36,066,451 as damages for loss of future profits;

(b) whilst the defendant has cross-appealed against a part of the decision allowing the plaintiff's claim for a declaration that there is a valid contract executed between the plaintiff and defendant and that the plaintiff is entitled to general damages of RM1,081,993 and costs of RM50,000 to be paid by the defendant to the plaintiff; and

(c) herein below are the reasons for the decision appealed against.

A FINDINGS

Issue 1

[18] Section 10 of the Contracts Act 1950 provides as follows:

B 10 What agreements are contracts

All agreement are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

C (a) ss 13 and 14 of the Contracts Act 1950 defines consent and what amounts to free consent:

13 Consent

Two or more persons are said to consent when they agree upon the same thing in the D same sense.

14 Free consent (relevant part) Consent is said to be free when it is not caused by –

(b) coercion ...

E (c) undue influence ...

(d) fraud ...

(e) misrepresentation ...

(f) mistake ...

F Whether the issuance of the letter of award was unauthorised, in non-compliance of the law and/or is unilateral

[19] I find there is no merit in defendant's contention that the issuance of the G letter of award was unauthorised, in non-compliance with the law and unilateral in nature as the letter of award was issued – (i) without the approval of the trustees of the defendant; and (ii) without approval of a main management committee meeting; and first, regarding the issuance of the letter of award not being in compliance with the KSDBKL rules, I am of the view H that these were not specifically pleaded and are therefore irrelevant to the proceedings. It is trite law that the court will only decide on matters pleaded and not otherwise (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 at p 201 para 34–p 202 para 35; [2010] 1 CLJ 665 679 para 34–35 at p 680.

I

[20] Be as it may, I am of the view that the internal management rule (*Turquand*'s rule) applied in that the plaintiff is entitled in law and in fact to presume that all internal processes and rules of the defendant were complied with. Looking at the letter of award, where Abdul Salim bin Mansor ('DW1')

signed the same in his capacity as Yang Di Pertua KSDBKL, any reasonable person would upon receipt of the letter of award arrive at the conclusion that its issuance must have been done in accordance with the defendant's internal procedures:

(a) I find support for the proposition that the *Turquand*'s rule applied in the instant case following the case of *Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672; [2014] 6 CLJ 17. In *Augusto Pompeo Romei*, the appellant approved and disbursed term loan and overdraft facilities in the sum of RM400,000 to Malaysian Aerosols Manufacturer Sdn Bhd ('Malaysian Aerosols'). In consideration thereof, a third party charge over a piece of property owned by Quickpack (M) Sdn Bhd ('the fourth defendant') was executed by the fourth defendant in favour of the appellant. The fourth defendant was wound up on 24 August 2001 and the official receiver was appointed as the liquidator. The respondents and the first defendant were directors and shareholders of the fourth defendant while the second defendant was a director of the fourth defendant. A directors' resolution of the fourth defendant was purportedly passed on 3 April 1999 giving approval and authority to the directors of the fourth defendant to execute the relevant documents for the creation of the third party charge over its property as security for the banking facilities granted to Malaysian Aerosols. The third party charge in Form 16A of the National Land Code was then executed by the first and second defendants as directors of the fourth defendant on 2 August 1999. The respondents denied having signed the directors' resolution and pleaded that they were forged by the first and second defendants. According to the respondents, the third party charge in favour of the appellant had been created without their knowledge or consent. The respondents filed a suit against the appellant and three others, namely the first, second and fourth defendants for the following reliefs, inter alia, (a) a declaration that the purported signatures of the respondents as appearing on the directors' resolution of the fourth defendant was of no legal effect thereby rendering it void and unlawful and (b) a declaration that the third party charge purportedly granted in favour of the appellant was void and unlawful. The appellant relied mainly on the valid third party charge which was duly executed by the fourth defendant, although it was premised on an invalid directors' resolution pursuant to the principle laid down in *Royal British Bank v Turquand* [1843-60] All ER Rep 435 ('Turquand's rule'). The High Court, in allowing the respondents' suit and allowing the two declarations sought, held that the directors' resolution did not exist legally for all intents and purposes and therefore did not give any valid authority for the consequential execution of any document by one or two directors of the fourth defendant. Dissatisfied, the appellant filed its appeal to the Court of Appeal. One of the issues was whether the internal management rule (*Turquand*'s rule)

applied; and whether the third party charge was defeasible (see headnotes). With respect to the issue of whether the *Turquand*'s rule applied in favour of the appellant, the answer was in the affirmative. Mah Weng Kwai JCA (as His Lordship then was) (delivering judgment of the Court of Appeal) at p 685 (MLJ); p 32 (CLJ) stated:

> [37] Under this rule, which is commonly referred to as the *Turquand*'s rule or the internal management rule, Lord Campbell CJ enunciated the principle as follows:
>
> > ... persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.

Further His Lordship at p 686 (MLJ); p 34 (CLJ) stated:

> [44] To begin with, it is not in dispute that the first and second defendants were at all material times lawful directors of the fourth defendant. The directors' resolution purportedly passed by the board of directors of the fourth defendant was an 'internal matter' in which the appellant was not involved nor was made aware of. The fraud and forgery denied by the respondents was a matter between the directors and the company. The fraud was pleaded against the first and second defendants and had nothing to do with the appellant. Importantly, it must be remembered that it is the directors' resolution which is said to be a forgery and is therefore void and of no effect. On the other hand, the third party charge was sufficiently executed by the first and second defendants, (without the signatories of the respondents) and there was no allegation of any forgery to taint the third party charge.

[21] Similarly, I find the fact that the land was registered in the name of the Trustees of KSDBKL is a non-issue as the plaintiff can rely on the *Turquand*'s rule. Moreover following the case of *Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors* [2009] 4 MLJ 759 at pp 767–768; [2009] 4 CLJ 365 at pp 375–376 para 14 the Federal Court, inter alia, held that 'Since an immovable property of the society may be registered in the name of the society itself if not registered in the name of the trustees, where it is registered in the names of trustees the trustees must be holding for the registered society'.

[22] Secondly, the defendant's contended there was no term in the letter of award which addresses the restrictions to land, ie (i) Ruler in Council and (ii) extension of the lease and conversion of the usage of the land. In this regard, the defendant relied on the evidence of Dato' Amrul Hisyam bin Alias ('PW1'), the director of the plaintiff who answered that he was aware that based on the restriction in interest on the land, no charge of the land is allowed without the consent of the Ruler in Council and likewise on the evidence of Mohamed Sah bin Karim ('PW3'), the general manager of the plaintiff who when referred to

the land search of the land (B/15) in cross-examination testified:

YFC	So pandangan Encik Mohamed, ruler council maksud pejabat tanah. Setujukah bahawa Encik Mohamed tidak pernah berunding dengan mana-mana wakil pejabat tanah pada masa mantan projek?
SAH	Belum lagi.
YFC	Setuju atau tidak?
SAH	Setuju, saya belum lagi.

(a) however I find the position on the need for the consent of the Ruler in Council has been clarified by PW1, who in re-examination stated:

AMRUL	It is standard practice in development, in whatever syarat nyata, we could apply to amend it accordingly to the proposed development.
RKP	What about the fact that the lease period being limited to 50 over years at that time when the letter of award was issued? Is it also something that will stop the development, you said?
AMRUL	No, the lease period could be extended. We could apply for the extension. *It is a common practice as well.*
RKP	Now at the time of the letter of award issued, was this issues as in the restriction in interest as in restriction in use and the lease hold period were ever been brought up or been discussed at all?
AMRUL	Yes, of course. That's why we request for Power of Attorney for us to execute. I mean to apply for the extension as well as tukar syarat. In the event that they are not cooperating to.

(Emphasis added.)

(NOP of 19 February 2015 at pp 88–89);

(b) Further I find PW3 has clarified:

RKP	Boleh? Ya, apa kefahaman kamu berkenaan dengan jawapan yang kamu bagi tadi bahawa Ruler in Council ini Pejabat Tanah? Apa yang kamu faham?
SAH	Kita itu kena buat permohonan untuk menukar syarat, apa.
YA	Plaintif kena buat permohonan.
SAH	Ya, Plaintif kena buat permohonan untuk menukar syarat tanah tersebut di Pejabat Tanah.

(NOP of 9 February 2015 at p 74);

(c) I am of the view that the lack of contractual terms may be implied by trade custom. In support of this proposition, I rely on the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; [1998] 3 CLJ 503, where there were two questions/issues posed to the Federal Court and one of which is of concern to the present case is this:

> Whether the Court of Appeal was correct in law and on the evidence in holding that the High Court was wrong in implying a term in the 1987 Agreement in the manner it did;

(d) Peh Swee Chin FCJ (as His Lordship then was) summarised the said question as follows:

> [T]he High Court by its order had declared that the said Federal licence issued in 1995, was within the scope of the said agreement made in 1987 by way of an implied term, which may be summarised as that so long as the said turf club was allowed or licensed under whatever laws, to conduct off-course and on-course betting, the said operator could continue to have the exclusive right to conduct and manage such off-course and on-course betting for the periods as provided in the said agreement. The said operator submitted that such an implied term applied and the said Turf club submitted to the contrary. The High Court agreed with the said operator in implying the term but the Court of Appeal agreed with the said turf club and reversed the decision of the High Court on this point. Now it is for us in the Federal Court to decide this question of implied term.

(For completeness the brief facts of the case is set in the judgment of Zakaria Yatim FCJ (as His Lordship then was) at p 179 (MLJ); p 544 b-e). On this issue both Peh Swee Chin and Zakaria Yatim FCJ(s) were of the opinion that the Court of Appeal erred on the issue of implied terms and that the decision of the High Court in implying a term in the agreement should be upheld. In addressing this issue, the dictum of Peh Swee Chin FCJ on the law of implied terms at pp 168–169 (MLJ); pp 531 g-h and 532 d-e (CLJ) are instructive:

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type.
>
> The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts.
>
> The third kind of implied term is one that is implied by custom or usage of

> any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s 92(e) of the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract; and

(e) it is the third type of implied term that the plaintiff is relying on in support of the plaintiff's case.

[23] The defendant contended that the current committee purported to have no knowledge of the letter of award. I find it hard to accept the said contention of the defendant for these reasons:

(a) the issuer of the letter of award is none other than Salim bin Mansor ('DW1') in his capacity as Yang Di Pertua, KSDBKL. He held the post of President of KSDBKL for the term 2004/2010 and acting President for the term 2010/2013 ie during the period when the plaintiff's letter of proposal to develop the property and the letter of award was issued;

(b) DW1 who is now testifying on behalf of the defendant with respect to how the letter of award was issued is now serving as a trustee to KSDBKL since he vacated the post of Yang Di Pertua in 2013. In fact DW1 is the only defendant witness who is acquainted with such material evidence regarding the letter of award as declared by DW2, Sr Alias bin Marjoh in the following words:

> In the meantime, I know that Tuan Ab Salim bin Mansor, the Ex-Acting President (Terms 2004/2010 and 2010/2013) ('Tuan Ab Salim') is also present as the defendant's witness and I trust that he has the best capacity to explain why such letters were issued. I believe that I can only explain the revocations reasons based on the current committee's stand point.
>
> (Q&A 4 WSDW2)

(c) according to DW1 the 'current committee' referred to the present main management committee comprising himself, one of the defendant's trustees amongst other personnel;

(d) in the light of the above, DW1 is a witness with an interest to serve and I have to treat his evidence with circumspect. I shall cite examples below to illustrate why I find DW1's evidence hard to believe as it is inconsistent with the contemporaneous evidence and the probabilities of the case;

> (i) an example would be when DW1 was cross-examined regarding the minutes of the meeting of 28 February 2007 of which he chaired (B/17-19). His evidence in examination-in-chief essentially

is that sometime in 2006, defendant was approached by Mohamed Sah bin Karim ('PW3') and Mr Fatos expressing the plaintiff's interest for a joint venture development proposal of the property; at the material time Dato' Amrul ('PW1') was not in the picture and he only knew that the latter is the plaintiff's owner only in mid-2008 upon introduction by his Deputy President, Tuan Hazahar bin Hashim. He invited Mohd Sah and Mr Fatos to attend the 28 February 2007 meeting for them to present the JV proposal to the committee members. DW1 called the meeting the development sub-committee meeting. However a perusal of the evidence in cross-examination showed that para 1 of the minutes of 28 February 2007 did not refer to the development sub-committee meeting and neither did para 2 of the letter of award. DW1 sought to rely on r 17 'The President shall take the chair at all meetings' of the KSDBKL Rules (B/37-43). However in my opinion since Ab Salim Mansur ('DW1') chaired the meeting as Yang Di Pertua KSDBKL and as President he is elected at the Biennal General Meeting of KSDBKL in accordance with r 14 and he forms part of the management committee/committee of management whilst as per r 23 the chairman of the sub-committee is appointed by the committee of management. Having considered the evidence I find Ab Salim Mansur's evidence that the meeting of 28 February 2007 was a development sub-committee meeting and that para 2 of the letter of the award was referring to the development sub-committee meeting just cannot gel with the contemporaneous evidence. In my view the meeting of the 28 February 2007 referred to in para 2 of the letter of award on a balance of probabilities referred to the management committee meeting;

(ii) when asked in cross-examination whether there were any terms on consideration for the letter of award given to the plaintiff Ab Salim Mansur was quick to refer to para (v) in the letter of award whereas in evidence-in-chief, in his answer to Q6 of WSDW1, he had said otherwise:

> It is stated clearly in that Letter of Award is granted based on the Sub-Committee Meeting held on the same morning which the defendant agreed with the JV Proposal.
>
> I also wish to state that there is no agreement whatsoever for the defendant to grant a final binding joint venture development contract because at that material time, the Sub-Committee did not even asked for any deposit, downpayment, security, guarantee or consideration from the plaintiff for the JV Proposal.

(iii) another example is when DW1 was cross-examined regarding his statement in answer to Q7 WSDW1:

> I was called into meetings with the Main Management Committee to explain and justify why such a Letter of Award is issued and confirmation whether I had indeed given any final contract to the plaintiff. It is reaffirmed consistently throughout the numerous meetings and discussions that the defendant deemed the letter of award is invalid and revoked.

Despite the allegation of 'numerous meetings' I find there was not even a shred of evidence regarding the same; all DW1 could pathetically offer was his response that the meetings were monthly meetings which he had to check!

(iv) in his evidence-in-chief DW1 said that he 'personally notified and informed Dato' Amrul via phone call that the letter of award could never be taken as an agreement and the JV proposal has been rejected completely by the defendant in the main management committee meeting' (Q&A 8 WSDW1). Yet in cross-examination he agreed when it was put to him:

> RKP: Saya juga katakan kepada kamu, dalam tahun 2012, sebelum kamu memanggil Zaks Trillion Management Sdn Bhd untuk membuat cadangan pembangunan, *kamu telah memanggil Dato Amrul untuk bertanya sama ada mereka masih berminat untuk menjalankan projek tersebut atau tidak*.
>
> SALIM: *Betul*.
>
> RKP: Dan Dato Amrul dengan tegas mengatakan 'Ya, memang kita berminat untuk menjalankan projek tersebut.' Betul atau tidak?
>
> SALIM: Betul.
>
> (Emphasis added.)

Yet when it was put to him his answer in cross-examination contradicted his answer given in examination-in-chief and his answer in examination in chief was not true, he disagreed (NOP of 13 February 2016 p 37).

(v) further in the light of what has transpired, I find DW1's disagreement to the following proposition put to him in cross-examination is unbelievable and illogical:

> RKP: Muka surat 8, perenggan 5. Kamu ada Katakan 'it's quite shocking for the plaintiff to come back after six years later claiming the letter of award is still valid and want to enforce it.' Saya cadangkan kepada kamu memandangkan kamu sendiri memanggil Dato Amrul dalam tahun 2012 untuk bertanyakan hasrat Plaintif untuk meneruskan projek ini adalah tak masuk akal.
>
> (NOP of 13 February 2015 at p 38).

(vi) in any event, there is no proof that the plaintiff was given a copy of

A the KSDBKL rules as DW1 seemed to allege in cross-examination that he was informed by Tuan Hazahar that a copy of the rules was given to Mat Sah. As I have alluded to before the *Turquand*'s rule applied in favour of the plaintiff.

B **[24]** Therefore in the final analysis on a balance of probabilities I find there was an offer and acceptance of the plaintiff's letter of award. I accepted the evidence of Dato' Amrul as follows:

6. Q: Apa yang terkandung dalam Surat Cadangan tersebut?

C A: Kesemua terma penting yang dipersetujui pihak-pihak kepada negosiasi tersebut telahpun dimasukkan berserta dengan suatu kajian kebolehlaksanaan yang disediakan oleh seorang penilai hartanah yang bereputasi.

D Q: Apakah terma-terma penting kepada Surat Cadangan tersebut?

A: Terma-terma penting adalah sepertimana terkandung dalam perenggan 2(i)–(vii) kepada Surat Cadangan tersebut. Ini merangkumi pihak-pihak kepada Projek ini, obligasi pihak-pihak, balasan kepada perjanjian ini antara yang lain.

E (Q&A 6 WSPW1)

[25] Further I accepted the evidence of Mohd Sah as follows:

21. Q: Adakah persetujuan pada mesyuarat tersebut membawa apa-apa perkembangan?

F A: Kami telah pada hari yang sama menerima suatu Surat Tawaran bertarikh 28.2.2007. Terma-terma kepada surat tawaran tersebut adalah sama dengan surat cadangan yang disediakan kami pada 27.02.2007.

G 22. Q: Adakah Surat Tawaran ini dihadapan Mahkamah ini?

A: Ya. Ianya adalah Item 1 kepada Ikatan Dokumen Bersama. [Bundle B]

23. Q: Apakah fahaman encik pada masa itu?

H A: Saya difahamkan bahawa kontrak ini telah dimuktamadkan diantara pihak-pihak Atas arahan Dato' Amrul, saya memulakan proses pemilihan dan perlantikan konsultan-konsultan yang berkenaan dan melantik peguam untuk mendrafkan 'Development Rights Agreement' sebagai formality kepada kontrak ini.

I (Q&A 21-23 WSPW3)

[26] The defendant contended there is no free consent because the parties did not agree to 'the same thing in the same sense': the defendant agreed to the

letter of award provided that all other terms will be finalised in the development rights agreement as stated in the letter of award and discussed at the 28 February 2007 meeting but all the other terms were not incorporated in the letter of award.

(a) with respect for the reasons explained above, I find there is free consent of the parties because all the essential terms of the agreement were agreed upon as contained in the letter of award. I shall discuss my view on free consent vis-a-vis the development rights agreement under the argument on whether the letter of award is a conditional and/or contingent contract hereafter.

Whether there was the element of consideration in the letter of award

[27] Section 2(d) of the Contracts Act 1950 defines consideration as:

(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or *promises to do* or to abstain from doing, *something, such* act or abstinence or *promise is called a consideration for the promise*.

Based on the emboldened words, it is clear that a promise to do something on the part of the promisee which is at the desire of the promisor, such promise is called consideration for that promise.

[28] The defendant contended there was no consideration performed by the plaintiff pursuant to the letter of award by relying on the following evidence of PW1 given during cross-examination:

YFC Dato' I refer you back to the letter of award at page 1, 2 and 3. In particular page number 2, para 2(v) consideration. Cash and in kind consideration comprising (a) deposit payment of RM1,000 upon execution of the Development Rights Agreement to be signed by both parties. (b) the balance in kind consideration of specified number of condominium unit, equivalent to the value of RM4,000,220 only. That was the consideration terms contained in the award letter. *Dato' do you agree based on this Letter of Award, there was no consideration provided by the plaintiff to the defendant*?

AMRUL *Yes*.

(NOP of 19 January 2015 at p 82)

(Emphasis is that of the defendant's)

YFC This Letter of Award was awarded to the plaintiff by Defendant *without any form of consideration* in return given by Plaintiff to the defendant, do you agree or disagree?

AMRUL *Yes*, at that moment for the letter of award.

(NOP of 19 January 2015 at pp 83-84)

(Emphasis is that of the defendant's.)

[29] With respect I find the defendant's contention cannot be sustained. Based on the definition of 'consideration', which I have alluded to above, I find there is proof of consideration for these reasons.

(a) it is not disputed that 'Consideration' is a salient term of the Agreement as provided for in para 2(v) (see para 7 above). PW1 testified:

RKP So what was the consideration that was agreed to be paid and when?

AMRUL Consideration number 1, to pay RM1,000 upon signing the Development Rights Agreement and the balance of RM4.22 million upon completion, upon CF, Certificate of Fitness being issued by DBKL.

RKP So at the point in time, there were questions asked as no considerations paid. At that point in time the letter of award was issued, was there any obligation on the part of the plaintiff to pay any kind of consideration?

AMRUL No.

(b) contrary to what the defendant contended of there being no consideration performed by the plaintiff it is clear that there is a promise by the plaintiff to develop the property as provided under the term in para 2(iv) of the letter of award and a further promise by the plaintiff to make the deposit payment of RM1,000 upon the execution of the development rights agreement and a specified number of condominiums equivalent to the value of RM4,220,000 whilst KSDBKL agreed to assign the developments rights to the plaintiff and granting the plaintiff a power of attorney in order to perform the development rights.

Whether the letter of award is a conditional or contingent contract

[30] The defendant contended that the letter of award is not 'final' but conditional in nature as all important terms discussed during the meeting was not incorporated in the letter of award. The defendant relied on the following:

(a) a development rights agreement must be executed by the plaintiff and defendant based on para 3 of the letter of award referred to in para 7 above.

(b) PW1 in his testimony under cross-examination stated:

YFC *Dato', do you agree that this Development Rights Agreement to be signed, will be the final document to encompass the details regarding*

both parties' rights and obligations?

YA Final document to what? Sorry.

YFC It is the final document to, document where all the rights and responsibilities of both parties regarding the said project.

YA What is your answer?

AMRUL Yes on top of the terms and conditions agreed upon at, I mean.

YFC So, your answer is 'yes'?

AMRUL *Yes*.

(NOP of 19 January 2015 at p 9.)

(Emphasis is that of the defendant's.)

[31] With respect I am unable to agree with the defendant's contention based on the evidence of PW1 and PW3 during examination-in-chief and re-examination and the minutes of the meeting of 28 February 2007 and weighed against DW1's evidence which I have alluded to (see paras 23-24 and the sub-paras thereunder). It is clear that the terms and conditions to be finalised in the development rights agreement is but a term to be fulfilled and not a condition of which the performance of the agreement was contingent upon.

(a) first it is evident from the testimonies of PW1 and PW3 respectively in examination-in-chief:

(i) 17. Q: Apakah fahaman encik pada masa itu?

A: Saya difahamkan bahawa kontrak ini telah dimuktamadkan diantara pihak-pihak. Saya lantas mengarahkan encik Sah Karim untuk memulakan proses pemilihan dan perlantikan konsultan-konsultan yang berkenaan dan melantik peguam untuk mendrafkan 'Development Rights Agreement' sebagai formaliti kepada kontrak ini.

18. Q: Apa yang berlaku kemudiannya?

A: Pengarah Projek En. Sah Karim memulakan kerja-kerja yang perlu. Namun dalam lingkungan 3 minggu kemudian, kami terpaksa menangguhkan kerja-kerja atas arahan En. Ab. Salim. Pada tahun 2012 pula, saya dihubungi oleh En. Ab. Salim bin Mansur untuk menyambung kerja-kerja.

(Q&A 17 & 18 WSPW1)

(ii) 23. Q: Apakah fahaman encik pada masa itu?

A: Saya difahamkan bahawa kontrak ini telah dimuktamadkan diantara pihak-pihak. Atas arahan Dato' Amrul, saya memulakan proses pemilihan dan perlantikan konsultan-konsultan yang berkenaan dan melantik peguam untuk mendrafkan 'Development Rights Agreement' sebagai formaliti kepada kontrak ini.

(Q&A 23 WSPW3)

(b) thereafter PW1 has explained the intention behind cl 3 of the letter of award as follows:

RKP There were questions asked that the letter of award did not include certain items or the terms but Dato' did refer to Clause 3 of the letter of award. Was there any reason or rather, can you explain why Dato' referred to Clause 3 in the letter of award? To explain there is a difference in terms of the clauses.

AMRUL As mentioned just now, at the level of shareholders and Directors, we are satisfied with the upper Clause, Clause 2 and the Clause 3 we leave it to the working, at this juncture we leave it to Nordin Torji to deal with Kelab Sukan to detail out the terms and condition. Spelled out here, *the principal terms agreed by the Directors and shareholders between two legal entities spell out clearly*. Now other terms and conditions shall be finalised in Development Rights Agreement to be executed by both parties, that's why I asked the defendant counsel to define the important Clause. So from your perspective or from my perspective? From my perspective at shareholders and Directors level, we only look at the letter of award, but if you go down to working level, then there will be different level of definition of importance. So that's my answer.

(Emphasis added.)

(NOP of 19 January 2015 at pp 86–87)

(c) thirdly, the position taken by the plaintiff is confirmed by DW1, the sole witness called by the defendant who has knowledge on the letter of award during the cross-examination agreed when it was suggested to him as follows:

RKP Tidak pasti. Jadi saya cadangkan kepada kamu, *sebenarnya terma-terma utama telah pun dipersetujui dan dikenal pasti dalam perjanjian ataupun dalam Surat Tawaran ini. Apa yang seharusnya dinyatakan dalam perjanjian Development Rights Agreement ini adalah berkenaan dengan perkara-perkara kecil yang berkaitan dengan pembangunan ini seperti yang telah dibincangkan dalam mesyuarat Jawatankuasa* pada 28.02.2007, seperti saya

cadangkan kepada kamu, ya. Kamu setuju atau tidak, ya, seperti, *lihat muka surat 17, Item 6*. Diri (00:51:24 inaudible) mengesa Hijrah Wangsa Sdn Bhd [Plaintif] untuk memberi cadangan bagi mengimbangi kerugian yang akan ditanggung oleh KSDBKL melalui kehilangan pendapatan sewa bulanan 6,000.00 sebulan, sewaktu kerja-kerja pembinaan projek kondominium tersebut dilaksanakan. Contoh-contohnya adalah seperti pembayaran jumlah pampasan secara lump sum ataupun pembayaran jumlah 6,000.00 setiap bulan selama projek (sic), masa projek tersebut dilaksanakan. MSK [PW3] berkata, perkara tersebut akan dibincangkan kemudian dan akan dimasukkan ke dalam Perjanjian Kerjasama Development Rights Agreement, apabila dipersetujui oleh kedua-dua pula pihak nanti. Jadi, ini menurut saya, setuju atau tidak, perkara-perkara yang harus dinyatakan dalam Development Rights Agreement. Betul atau tidak?

SALIM Betul.

(Emphasis added.)

(NOP of 13 February 2016 at p 26)

(d) finally to buttress home the point that I rely on the following passages from two high authorities as follows:

(i) *Nippon Express (M) Sdn Bhd v Che Kiang Realty Sdn Bhd & Another Appeal* [2013] 7 CLJ 713, where the Court of Appeal opined that in determining whether there was a concluded contract, the learned judge erred in not asking the important question of whether the 'failure to sign the sale and purchase agreement' is a condition precedent or a condition which is part of the terms of the contract. The Court of Appeal answered the significance of the question at p 732 as follows:

> [45] Buckley LJ in *Eastham v Leigh London and Provisional Properties Ltd* [1971] 1 Ch 871 observed as follows:
>
> That is not, in my judgment, a condition precedent to the contract at all; it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain just as in all contracts for sale the terms of the bargain are customarily described as conditions of sales.

(ii) *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224; [1979] 1 LNS 29 was referred to in *Nippon Express (M) Sdn Bhd* at pp 732–733 as follows:

> [47] In *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224; [1979] 1 LNS 29 where the Supreme Court through the

judgment of Lee Hun Hoe Chief Justice (Borneo) observed as follows:

> In the present case any talk about conditions precedent or conditional contract is misleading. It is irrelevant and tends to cause confusion. The facts are clearly distinguishable from *Aberfoyle*'s case. There the contract was conditional on the vendor obtaining a renewal of certain leases. As the conditional precedent was not satisfied there was no contract of sale, the relationship of vendor and purchaser was not created.
>
> If the appellant were right there would be no contract of sale as condition precedent had not been fulfilled and they should be entitled to a refund of a deposit. The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The 'conditions' agreed by the parties were nothing more than the terms of contract. The fact that a 'condition' is a term of a contract does not make it a conditional contract. There are no conditions precedent in the present case as understood in *Aberfoyle*'s case.

[32] Now that I have discussed my reasons as to why I am of the view there is free consent vis a vis the development rights agreement, on a balance of probabilities, I find there is free consent of the parties because all the essential terms of the agreement were agreed upon as contained in the letter of award.

[33] For all the reasons given above, I am of the view that the letter of award is a legally binding agreement between the plaintiff and the defendant, ie my answer to Issue 1 is in the affirmative.

Issues 2 and 3

Whether delay has distinguished the rights of the plaintiff

[34] The defendant submitted that the plaintiff is not entitled to specific performance of the letter of award because the plaintiff is estopped from claiming the development rights agreement to be executed on these grounds:

(a) the plaintiff failed to take reasonable steps to follow up on the development rights agreement with the defendant.

(b) there was a delay of more than five years based on the testimonies of PW1 and PW2 during cross-examination that there was no official letter from the defendant that the matter has been KIV and neither did the plaintiff requested for any letter of confirmation from the defendant to KIV the matter (see NOP of 19 January 2015 at p 56 (PW1) and NOP of 9 February 2015 at pp 52–53 (PW2)).

(c) the defendant relied on the case of *Paramaha Enterprise Sdn Bhd & Ors v The Government of the State of Sabah & Anor* [2015] 2 CLJ 268 where

the Court of Appeal at p 269 held as follows:

> (4) This agreement to develop the area had basically been a commercial venture. Even after seven years since the signing of the agreement, nothing of substance had been delivered by the first plaintiff. The trial judge was not in error when he concluded that there was a total failure of consideration moving from the first plaintiff to the first defendant. Commercial sense would warrant termination of the agreement, which was exactly what the first defendant had done. (paras 42 & 44).

[35] Additionally, the defendant submitted the plaintiff is not entitled to specific performance as:

(a) there is a total failure of consideration from the plaintiff. Section 14 of the Contracts Act 1950 was cited as follows:

> Specific performance of part of contract where part unperformed is large
>
> Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance ...

(b) it is impossible to perform the letter of award as the plaintiff has failed to obtain consent of the trustees of the defendant and the ruler in council and the proposed development is contrary to the express term in the land title. The defendant cited *MMI Industries Sdn Bhd v Let Sin Industries Sdn Bhd* [2010] 5 MLJ 71 at p 72; [2010] 1 CLJ 36 at p 37 for the proposition that for the remedy of specific performance to be applicable, the party seeking the remedy must be able to show that he is ready and willing to perform the contract.

[36] With respect I am unable to agree with the defendant's submission in its entirety. It is my finding that there is a suspension/deferment of the agreement pending the resolution of the defendant's internal matters for the following reasons:

(a) YFC	Based on this in-house draft agreement, when was the draft agreement forwarded to the defendants?
AMRUL	It was not forwarded.
YFC	Dato', why was it not forwarded?
AMRUL	After the acceptance, few weeks after that, I received a call as well as.
YA	A few weeks after acceptance?
AMRUL	Yes, I think two weeks after that. Mohamed Sah came to me, told me that we have to KIV first, the letter of award, due to internal issues between Kelab Sukan.

(NOP of 19 January 2015 at p 55)

This was confirmed by PW3 who stated:

YFC Siapakah yang memberikan arahan untuk penangguhan tersebut?

SAH Tuan Salim daripada Defendan sebab ada isu dalaman, saya tak tahu.

(NOP of 9 February 2015 at p 50.)

Weighing the evidence of the plaintiff vis-a-vis the evidence gleaned from DW1 which I have alluded to in para 23, particularly, para 23(d)(iii) above, on a balance of probabilities, I find that it was about three weeks after the issuance and acceptance of the letter of award (about March 2007) that DW1 informed PW3 orally to suspend/defer the agreement due to internal issues in the defendant (NOP of 9 February 2015 at p 50); of which PW3 thereafter communicated the same to PW1;

(b) notwithstanding that DW1 denied having postponed the performance of the agreement, he admitted in cross-examination that he had sought the affirmation of PW1 whether the plaintiff was still keen to continue with the project (NOP of 13 February 2015 at p 36), albeit in re-examination, whilst not denying that he contacted PW1 but for the purpose of '(S)ama ada dia berminat atau tidak. Jika Amrul berminat, hendaklah mengemukakan cadangan baru, bukan kepada cadangan awal dia terdahulu. Sebab yang awal, telah pun direvoke, telah dibatalkan';

(c) given the credibility of DW1 which I have assessed at para 23 above and the sub-paras thereunder, I find it hard to believe DW1's evidence that the letter of award was terminated in 2007 bearing in mind the chain of events which the plaintiff correctly submitted:

(a) That there was a telephone conversation on or about 3 weeks after the issuance of the letter of award;

(b) That parties did not exchange any further correspondence till 2013;

That there was a further telephone conversation on or about 2012;

(c) That a draft development rights agreement was issued by the plaintiff on 4.10.2013;

(d) That the defendant held a meeting on 21.11.2013;

(e) That the defendant terminated the Agreement by a letter dated 23.12.2013.

(d) in the light of the findings above, unlike the present case, with respect I am of the view that the *Paramaha*'s case can be distinguished as in that case the parties entered into a written agreement on 25 May 1996 and no further action was recorded until the defendant issued a notice of

termination on 28 May 2003 and the plaintiff filed the action on the ground that the termination was unlawful whilst the first defendant, counterclaimed, inter alia, for declarations that the plaintiffs were in breach of the agreement in failing to complete the development within the stipulated time without just cause;

(e) flowing from my finding regarding the deferment of the performance of the letter of award, I find the notice of termination by the defendant to the plaintiff on 23 December 2013 was unlawful as it was a unilateral decision without giving reasons in the termination letter (B/6). In cross-examination, DW1 admitted that during the meeting of 21 November 2013 which he chaired the plaintiff was not informed of the reasons why the defendant regarded the letter of award was invalid (NOP of 13 February 2015 at pp 78–80) and neither were the reasons stated in the notice of termination. In re-examination, DW2, Sr Alias bin Marjoh, the current defendant's acting president for the term 2013/2015 admitted that the six reasons why the defendant regarded the letter of award was unlawful were not communicated to the plaintiff was because 'There were (sic) no avenue for me to explain to the plaintiff. This came about after this plaintiff filed the writ of summons to the defendant. So I the reply to the writ of summons, these were the reasons in defence towards the summons that was issued to us'. I find it difficult to accept the six reasons given by the defendant as grounds justifying the termination of the letter of award when none of these reasons were ever informed to the plaintiff. In any event I have addressed all the defences raised by the defendant and have given my reasons why I did not find them tenable.

[37] It is trite that specific performance is a discretionary relief. In *MMI Industries Sdn Bhd* at p 81 (MLJ); p 46 (CLJ) D Abdul Malik Ishak JCA has succinctly described:

> [8] An order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is an equitable remedy. It cannot be asked for as of right. It is certainly a discretionary remedy but the discretion cannot be exercised arbitrarily or capriciously. The exercise of the discretion is always governed by fixed rules and principles (*Caesar Lamare v Thomas Dixon* (1873) 6 LRHL 414, at p 423).

Notwithstanding the fact that it was the defendant who deferred the agreement till about 2012, I am of the view that as admitted by PW1 in cross-examination for such a huge project, the plaintiff ought to have requested from the defendant a letter of confirmation asking the plaintiff to defer the matter. Therefore in the exercise of my discretion, I am not inclined to grant specific performance of the letter of award.

Issue 4

[38] Alternatively, the plaintiff submitted that they are entitled to RM36,066,451 on these grounds:

(a) based on the estimation of loss of future profits specified in the feasibility study at B/50-57;

(b) there was no real dispute made concerning the feasibility study other than that the amounts therein were an estimation of the projected future profits; and

(c) the feasibility study is the best evidence available to prove their claim coupled with the testimony of PW2, which 'was not strongly challenged nor was it discredited by cross-examination'.

The plaintiff relied on the dictum of the Court of Appeal in the case of *Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd* [2014] 5 MLJ 676 at pp 691 and 693; [2014] 5 CLJ 318 at pp 337 and 339 as follows:

> [40] Returning to the question of proof, we observe that there is no provision that requires that such loss is only provable by production of receipts. *The best evidence rule requires proof not by the 'best evidence' but by the 'best evidence available'*. The unavailability of receipts was explained on the grounds the receipts were not kept for more than six years.
>
> [41] *We find that the probabilities of the appellant's claim on quantum were based on evidence of witnesses whose testimony were not strongly challenged and were not discredited by cross-examination, and supported by invoices*. The respondent's case was only a challenge to prove it, and that they were costs under the JVA to be borne by the appellant. *In other words, there was nothing placed in evidence by the respondent on its side of the scale on the 'balance of probabilities' that such expenses were not incurred. Thus, placed upon the 'balance of probabilities' and however much the evidence adduced by the appellant was sought to be doubted, the scales tilt in favour of the appellant when there is nothing placed on the scale for the respondent*.
>
> ...
>
> [50] Since the sum was fixed and not determined by market values at the time of default, the figures were accepted by the parties to the JVA and the supplementary agreement and was binding upon them. *It was not a mere estimate. Hence, the appellant is entitled to rely upon this accepted sum as the best available evidence when proof of actual loss is not available in the determination of the loss of gross profit suffered*. These agreements were not disputed and were before the High Court. There was evidence before the High Court of the loss. This is not a case of the appellant merely writing down the particulars and throwing the same at the head of the court as proof of the damages suffered'.

(Emphasis is that of the plaintiff's).

[39] With respect I am of the view that the case of *Juta Damai* can be distinguished in the following manner:

(a) the appellant and the respondent entered into a joint venture agreement and a supplementary agreement under which the appellant was to undertake a housing, commercial and industrial development including public amenities and infrastructure on a piece of land of 70 acres. The appellant, inter alia, argued that it had suffered losses incurred by the appellant for preliminary works in respect of the development and loss of profit in the sum of RM21,486,263.75 based on the appellant's entitlement under the supplementary agreement;

(b) however in the present case the parties are yet to execute the development rights agreement.

(c) the dictum at para 50 of *Juta Damai* is of great significance in that:

(i) it was provided in the JVA and the supplementary agreement that in the event the respondent's entitlements were not handed over to the respondent, the appellant's obligation was settled by the payment of RM4,243,886.25;

(ii) since the sum was fixed and not determined by market values at the time of default, the figures were accepted by the parties to the JVA and the supplementary agreement was binding on them;

(iii) it was not a mere estimate;

(iv) the accepted sum was the best available evidence when proof of the actual loss was not available in the determination of the loss of gross profit suffered; and

(v) it was for the court to nominate a figure to set the nominal reduction and a nominal reduction was fixed at 30%,

(d) with respect I disagreed with the plaintiff's submission that 'The defendant asserts ... that the sum proposed by the financial feasibility study is to be discarded as the maker had failed to consult the relevant (is) a bare statement without any assertion as to who those 'relevant parties' might be. In fact the learned defendant counsel has cross-examined PW2 (Yeo Kian Aun) as to the 'relevant parties' being the architect and engineer (see NOP of 19 January 2015 at pp 116 & 119).

Further, I find the plaintiff has contradicted itself when in the next breath it submitted that PW2, a registered valuer and estate agent has testified that for the feasibility study, he did not need input from an *architect, engineer* and neither did he require any approved development plan before he could come out with each specific area.

Be that as it may, it is pertinent to note that the feasibility study was prepared without certainty and confirmation and was a mere estimate which could be varied as confirmed by PW2 in cross-examination –

FRY	In other words, this study, the one that you prepared at page 51, also could be varied, the result could be varied?
YEO	Yes.
FRY	Also, each square feet for each unit also could be varied?
YEO	Yes.
FRY	And it is not conclusive.

(NOP of 19 January 2015 at p 129)

...

FRY	So in other words they are all only estimations?
YEO	Estimations.
FRY	Which could be varied?
YEO	Can be varied.

(NOP of 19 January 2015 at p 136)

...

FRY	Ok. This particular RM95.975 million, were prepared by you?
YEO	Yes.
FRY	Back in 2006?
YEO	Yes.
FRY	And this particular RM95 million could be varied as well?
YEO	Could be varied.

(NOP of 19 January 2015 at p 140.)

(e) hence based on the evidence, I agreed with the defendant's submission that the feasibility study upon which the plaintiff depended to arrive at the loss of future profits of RM36,066,451 is but an estimation which can be varied; and therefore I find the plaintiff failed to provide credible and reliable evidence to satisfy the claim of RM36,066,451. Nevertheless I am of the view that the principle in *Juta Damai* where the Court of Appeal at p 340 opined as follows is applicable:

> [51] We consider next whether the loss of profits to be awarded remains at the sum of RM21,813,930.22. Though parties agreed as we concluded above, what the profits were from the joint venture and determined how it was to be shared, and that the share of the respondent is fixed at RM4,243,886.25, the appellant's written evidence had asserted at reduced viability. *However, there is no evidence at all by what factor or percentage the profitability is reduced. We do not think however that because there is no evidence by how much the profitability was reduced, no loss of profits should be awarded. In such a case, it is for the court to nominate a figure to set the nominal reduction. We, therefore, fix that nominal reduction at 30%*. (Emphasis added.)

In the circumstances, I had allowed a 15% reduction damages for the unlawful termination at 1% of RM36,066,451.00 which is RM1,081,993.53.

CONCLUSION

[40] For the reasons stated above, in summary my findings are:

(a) Issue 1 – in the affirmative;

(b) Issue 2 – in the negative;

(c) Issue 3 – in the negative;

(d) Issue 4 – in the affirmative but the reduced sum of RM1,081,993.53 was granted.

Since the plaintiff has proven its claim on a balance of probabilities I had allowed the plaintiff's claim as per my order at para 17 above.

[41] However since I found the defendant has not proven its counterclaim I had dismissed the defendant's counterclaim with costs.

[42] In terms of costs, I had allowed costs in the sum of RM50,000 to be paid by the defendant to the plaintiff.

Plaintiff's claims allowed with costs of RM50,000.

Reported by Dzulqarnain Ab Fatar